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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 WILLIAM COMSTOCK,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL, Acting  
13 Commissioner of Social Security,

14 Defendant.

CASE NO. C17-5288-MAT

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

15 Plaintiff William Comstock proceeds through counsel in his appeal of a final decision of  
16 the Commissioner of the Social Security Administration (Commissioner). The Commissioner  
17 denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an  
18 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record  
(AR), and all memoranda of record, this matter is AFFIRMED.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1963.<sup>1</sup> He completed the eighth grade and previously worked  
21 as a glazier, caulker, and auto windshield installer. (AR 50, 83, 252.)  
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<sup>1</sup> Plaintiff's date of birth is redacted back to the year in accordance with Federal Rule of Civil  
Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files.

1 Plaintiff protectively filed a DIB application in November 2012, alleging disability  
2 beginning July 1, 2011. (AR 191.) Plaintiff remained insured for DIB through December 31, 2013  
3 and was required to establish disability on or prior to that “date last insured” (DLI). *See* 20 C.F.R.  
4 §§ 404.131, 404.321. His application was denied initially and on reconsideration.

5 On June 4, 2014, ALJ David Johnson held a hearing, taking testimony from plaintiff, his  
6 wife, and a vocational expert (VE). (AR 40-89.) On August 15, 2014, the ALJ issued a decision  
7 finding plaintiff not disabled. (AR 20-35.)

8 Plaintiff timely appealed. The Appeals Council denied plaintiff’s request for review on  
9 February 22, 2016 (AR 9-14), making the ALJ’s decision the final decision of the Commissioner.  
10 Plaintiff appealed this final decision of the Commissioner to this Court.

### 11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

### 13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining  
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
16 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not  
17 engaged in substantial gainful activity since the alleged onset date. At step two, it must be  
18 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff’s left  
19 shoulder abnormality, low back abnormality, recent L5-mid metatarsal fracture, and sleep apnea  
20 severe. The ALJ found no severe mental impairment. Step three asks whether a claimant’s  
21 impairments meet or equal a listed impairment. The ALJ concluded plaintiff’s impairments did  
22 not meet or equal the criteria of a listed impairment.

23 If a claimant’s impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has  
2 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform  
3 light work not requiring more than occasional bending, stooping, crouching, or left upper extremity  
4 pushing or pulling; no more than frequent reaching, handling, or fingering; and not requiring the  
5 need to grab onto grab bars, railings, or ladders, work overhead with the left upper extremity, or  
6 walk on irregular surfaces. The ALJ found no past relevant work.

7         If a claimant demonstrates an inability to perform past relevant work, or has no past  
8 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant  
9 retains the capacity to make an adjustment to work that exists in significant levels in the national  
10 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,  
11 such as work as a small parts assembler, solder machine feeder, and tagger. The ALJ also found  
12 that, even if more limited, plaintiff could still perform the occupations identified, as they are  
13 unskilled, consisting of simple tasks that require little or no judgment. He noted the VE's  
14 testimony the occupations could still be performed with additional limitations related to teamwork,  
15 interaction, and routine nature of tasks.

16         This Court's review of the ALJ's decision is limited to whether the decision is in  
17 accordance with the law and the findings supported by substantial evidence in the record as a  
18 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d  
19 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported  
20 by substantial evidence in the administrative record or is based on legal error.") Substantial  
21 evidence means more than a scintilla, but less than a preponderance; it means such relevant  
22 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*  
23 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of

1 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
2 F.3d 947, 954 (9th Cir. 2002).

3 Plaintiff asserts error in the consideration of medical opinions and evidence relating to his  
4 shoulder impairment, ability to stand and walk, and mental impairments, and in the rejection of his  
5 wife's testimony. He requests remand for further proceedings. The Commissioner argues the  
6 ALJ's decision has the support of substantial evidence and should be affirmed.

### 7 Medical Opinions and Evidence

8 Plaintiff contends the ALJ erred in considering medical opinions from examining  
9 physicians, and in construing medical evidence. Because the record contained contradictory  
10 physician opinions, the ALJ could only reject the opinion of the examining physicians with  
11 "'specific and legitimate reasons' supported by substantial evidence in the record for so doing."  
12 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (quoting *Murray v. Heckler*, 722 F.2d 499,  
13 502 (9th Cir. 1983)).

14 The ALJ is responsible for resolving conflicts in the medical record. *Carmickle v. Comm'r*  
15 *of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008). When evidence reasonably supports either  
16 confirming or reversing the ALJ's decision, the court may not substitute its judgment for that of  
17 the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). "Where the evidence is susceptible  
18 to more than one rational interpretation, it is the ALJ's conclusion that must be upheld." *Morgan*  
19 *v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999).

#### 20 A. Shoulder Impairment

21 In February 2013, consultative examiner Dr. Timo Hakkarainen opined plaintiff could lift  
22 twenty pounds occasionally and ten pounds frequently on the right, and ten pounds occasionally  
23 and frequently on the left; could reach, handle, and finger without limitation on the right and less

1 than an hour on the left; should not climb ladders, kneel, crouch, or crawl; and should not work  
2 around heights. (AR 315.) Plaintiff avers the ALJ erred in rejecting this opinion,<sup>2</sup> and in accepting  
3 the contrary opinion of consultative examiner Dr. Gary Gaffield and the observations of  
4 psychological consultative examiner Dr. Lezlie Pickett.

5 The ALJ did not wholly reject the shoulder-related limitations assessed by Dr.  
6 Hakkarainen. He found plaintiff able to perform light work, which involves lifting no more than  
7 ten pounds frequently, and included limitations to no overhead work with the left upper extremity,  
8 no climbing ladders, ropes, or scaffolds, and no work requiring plaintiff to hold on to grab bars,  
9 railings, or ladders (AR 26, 315.) However, the RFC allows for occasional lifting of twenty  
10 pounds on both the left and right, occasional left upper extremity pushing and pulling, and frequent  
11 reaching, handling, or fingering on the left and right. (*Id.*) The RFC is consistent with the April  
12 2014 opinions of Dr. Gaffield (AR 379-80), and took into account Dr. Pickett's April 2014  
13 observations of plaintiff's greater capabilities and volitional limitation (AR 385-88).

14 As described by the ALJ, Dr. Hakkarainen did not find evidence of arthropathy or  
15 tendinopathy in the right shoulder, but found "likely 'rotater cuff arthropathy' of the left shoulder."  
16 (AR 31 (citing AR 315).) Plaintiff appeared "“extremely apprehensive and protective of both his  
17 shoulders”" during the examination, but his "apprehension seemed decreased as the claimant  
18 helped his significant other carry objects out[.]" (*Id.* (citing AR 313).) The ALJ found this  
19 inconsistent presentation to undermine plaintiff's credibility and indicate greater functioning than  
20 presented with or alleged. He found plaintiff's protective presentation with both shoulders  
21 inconsistent with the treatment record, "wherein the claimant reported only a right shoulder ache  
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23 <sup>2</sup> Dr. Hakkarainen also found no limitation in standing, walking, sitting, climbing upstairs,  
balancing, stooping, or with environmental conditions other than heights. (AR 315.) Plaintiff, as discussed  
below, argues the ALJ erred in accepting Dr. Hakkarainen's opinion on standing and walking.

1 ‘sometimes[.]’” (*Id.*) Dr. Hakkarainen noted decreased “‘volitional’ range of motion” in the right  
2 shoulder, but “full active and passive range of motion[.]” “[d]ecreased abduction, flexion, and  
3 external rotation” in the left shoulder, and “5/5 strength in all of his extremities, including grip  
4 strength. (AR 31 (citing AR 314-15).)

5 The ALJ assigned some weight to Dr. Hakkarainen’s opinion in finding it supported by  
6 observations made and testing performed. (*Id.*) He did not give the opinion greater weight because  
7 plaintiff’s reports and presentations were not entirely credible.<sup>3</sup>

8 Plaintiff does not challenge the ALJ’s credibility finding. The unchallenged and specific,  
9 clear, and convincing reasons provided in support of that conclusion include inconsistencies in  
10 reporting of alcohol and drug use; inconsistencies between the degree of limitation alleged and the  
11 minimal treatment sought and needed, and with the treatment records themselves; evidence of  
12 secondary gain and showing a more active lifestyle than alleged; inconsistency between testimony  
13 and reporting to medical personnel; and observations of medical examiners and treating personnel.  
14 (AR 23-25, 27-32.)

15 Plaintiff does argue the ALJ erred in relying on the credibility finding to reject the opinions  
16 of Dr. Hakkarainen given that this examining physician did not himself discredit plaintiff’s  
17 complaints and supported his opinions with his own observations. *See Ryan v. Comm’r of Soc.*  
18 *Sec.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008) (“[A]n ALJ does not provide clear and convincing  
19 reasons for rejecting an examining physician’s opinion by questioning the credibility of the  
20 patient’s complaints where the doctor does not discredit those complaints and supports his ultimate  
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22 <sup>3</sup> In Social Security Ruling (SSR) 16-3p, the Social Security Administration (SSA) rescinded SSR  
23 96-7p, eliminated the term “credibility” from its sub-regulatory policy, clarified that “subjective symptom  
evaluation is not an examination of an individual’s character[.]” and indicated it would more “more closely  
follow [its] regulatory language regarding symptom evaluation.” SSR 16-3p. However, this change is  
effective March 28, 2016 and not applicable to the August 2014 ALJ decision in this case.

1 opinion with his own observations.”) Plaintiff also points to other treatment records, both before  
2 the ALJ and submitted to the Appeals Council, as bolstering Dr. Hakkarainen’s opinion, and  
3 criticizes the ALJ’s reliance on the opinions of other consultative examiners. (*See* Dkt. 16 at 4-7.)  
4 Plaintiff does not, however, demonstrate error in the ALJ’s consideration of his shoulder  
5 impairment.

6 “An ALJ may reject a treating [or examining] physician’s opinion if it is based ‘to a large  
7 extent’ on a claimant’s self-reports that have been properly discounted as incredible.” *Tommasetti*  
8 *v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan*, 169 F.3d at 602). This remains  
9 true even where a physician considers objective findings on examination. *See, e.g., Chaudhry v.*  
10 *Astrue*, 688 F.3d 661, 667 (9th Cir. 2012). An ALJ may also consider inconsistency between a  
11 physician’s opinion and medical evidence of record, *Tommasetti*, 533 F.3d at 1041, and  
12 discrepancy or contradiction between a physician’s opinion and that physician’s own notes or  
13 observations, *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

14 In this case, Dr. Hakkarainen himself raised a question as to the reliability of plaintiff’s  
15 presentation on examination: “When leaving the examination, he does appear to have a  
16 subjectively decreased apprehension in helping his significant other carry objects out. This may  
17 represent some volitional affect of his complaints.” (AR 313.) Other physicians raised similar  
18 concerns. In April 2013, Dr. Gaffield described plaintiff’s disheveled appearance, with dirty and  
19 grimy hands, and stated plaintiff “looks as though he had been doing some heavy labor.” (AR  
20 377, 379; *see also* AR 32.) In April 2014, Dr. Pickett observed plaintiff “evidenced zero restriction  
21 of movement[,]” and “moved all extremities quickly and easily throughout the full range of motion  
22 without any sign of distress, pain, or difficulty.” (AR 385.) She elaborated with respect to  
23 plaintiff’s shoulders:

1 In fact, though he reported having ‘pain’ in his shoulders, on several  
2 occasions throughout the interview he would bend at the hips and  
3 lean fully forward with his right and left arms completely and fully  
4 extended in front of him, then rifle through various papers that he  
5 had spread out on the floor before him or pick up/place something  
6 on the floor. At one point, his arms were outstretched and appeared  
7 nearly hyper-extended, but he was moving them easily. When asked  
8 how he could show such range of motion when he said he was in  
9 ‘severe pain,’ he seemed surprised and quickly tried to recover,  
10 jumping back into an upright position in the chair, laughing and  
11 stating, ‘Oh, yeah. I am not supposed to show that I can do that,  
12 right? [Laughing.]’ Additionally, though he reported his back was  
13 in ‘pain,’ it was noted that – when he wasn’t bending forward to rifle  
14 through the papers on the floor in front of him – he spent most of  
15 the interview with his forearms bent up towards his ears and his head  
16 resting in his hands, which were placed behind his head.

17 (AR 385-87 (also including other observations of plaintiff’s physical functioning).)

18 The fact Dr. Pickett is a psychologist does not render her observations irrelevant. As  
19 explained by the ALJ: “[W]hile this was a psychological examination, Dr. Pickett recorded careful  
20 observations related to the claimant’s presentation which are of value when considering the  
21 claimant’s presentation to other medical personnel.” (AR 24.) The ALJ found Dr. Pickett’s  
22 detailed discussions of her observations to bolster the weight her opinion was due. (AR 25.)

23 Nor does plaintiff persuasively rely on evidence submitted to the Appeals Council. As the  
Commissioner observes, that evidence does not include a medical opinion assessing functional  
limitations retroactive to the time period under consideration. (*See* AR 394-459). The evidence  
also provides additional support for the ALJ’s reasoning in showing treating physician Dr. Daniel  
Clerc suspected “some possible symptom magnification.” (AR 411; *see also* AR 439 (further  
advising, during this September 2014 office visit, that any MRI would be performed “for purposes  
of medical management” and not “for the purposes of satisfying request from lawyers [sic] office  
in pursuit of” a disability claim).)



1 The ALJ reasonably considered evidence of unreliable symptom reporting and  
2 presentation, including Dr. Hakkarainen's own observation, as a basis for not according full weight  
3 to the shoulder-related limitations assessed. The ALJ's description of this opinion further reveals  
4 consideration of inconsistency with medical evidence of record, and between the limitations  
5 assessed and the objective findings on examination. (See AR 31.) Plaintiff offers a different  
6 interpretation of the medical evidence, but the ALJ's interpretation is at least equally rational. The  
7 ALJ's consideration of the evidence relating to plaintiff's shoulder impairment has the support of  
8 substantial evidence and will not be disturbed.

9 B. Standing and Walking Limitations

10 Both Dr. Hakkarainen and Dr. Gaffield opined plaintiff had no limitations in standing,  
11 walking, or sitting. (AR 315, 380.) Dr. Gaffield assessed a need to avoid walking on irregular  
12 surfaces due to plaintiff's left foot fracture, and opined: "A boot protecting plaintiff's left foot  
13 would be essential, unfortunately he chooses not to wear it. If he did it should be used on all  
14 terrains and all occasions." (AR 380.)

15 The ALJ gave some weight to Dr. Hakkarainen's opinion for the reasons stated above. (AR  
16 31.) He gave significant weight to Dr. Gaffield's opinion, finding it largely consistent with  
17 observations on examination, but did not wholly adopt the opinion because Dr. Gaffield did not  
18 have the benefit of the record in its entirety. (AR 32.) The ALJ contrasted Dr. Gaffield's  
19 observation that plaintiff walked with a limp, with Dr. Pickett's observation, only five days earlier,  
20 that plaintiff was able to walk without pain behavior. The ALJ added: "Dr. Gaffield also did not  
21 have the benefit of the claimant's testimony of mowing the lawn during the relevant time period  
22 or picking up yard debris. While the claimant attempted to minimize this at the hearing, Dr.  
23 Gaffield did observe the claimant had grimy hands." (*Id.*) The ALJ did not include any limitations

1 in walking or standing, but did include Dr. Gaffield's assessment of a limitation to work not  
2 requiring walking on irregular surfaces. (AR 26.)

3 Plaintiff avers error in the ALJ's reliance on the opinions of Drs. Hakkarainen and Gaffield,  
4 pointing to medical records relating to his foot fracture. Plaintiff reported he injured his foot in  
5 late August 2013 and received a diagnosis of a fracture on September 6, 2013. (AR 350.) X-rays  
6 taken two days prior to the diagnosis "show a minimally displaced fracture at the base of the fifth  
7 metatarsal, proximal to the intermetatarsal joint." (*Id.*) On September 19, 2013, orthopedic  
8 surgeon Dr. Michael Miller noted plaintiff had broken two casts since the fracture, described a  
9 new x-ray as showing a slightly more displaced fracture, and switched plaintiff to a fracture boot  
10 given concern he could not care for a cast. (AR 349-50.) In January 2014, plaintiff reported to  
11 Dr. Clerc constant throbbing and pain and the need to elevate his foot and wear heavy boots to  
12 maintain any mobility (AR 361), and an x-ray showed nonunion of the fracture (AR 371).  
13 Evidence submitted to the Appeals Council shows plaintiff continued to report foot pain. (AR  
14 443, 447, 450.)

15 Plaintiff observes that Dr. Hakkarainen conducted an examination in February 2013, prior  
16 to his foot fracture, and assessed his ability to stand and walk solely in relation to his low back  
17 pain. (*See* AR 311.) He describes Dr. Gaffield as appearing to deem his foot fracture a temporary  
18 condition, failing to review records or imaging results showing the nonunion fracture, and, like  
19 Dr. Hakkarainen, assessing his ability to stand and walk based solely in relation to low back pain.  
20 Plaintiff states a limitation to sedentary work, considered together with his age, education, and  
21 absence of past relevant work, mandates a finding of disability under the Medical Vocational  
22 Guidelines. *See* 20 C.F.R. pt. 404, subpt. P, app. 2.

23 As the Commissioner observes, the record does not contain a medical opinion limiting

1 plaintiff to sedentary work or any assessment of limitations by Dr. Clerc or Dr. Miller. Dr.  
2 Hakkarainen, moreover, properly considered plaintiff's ability to stand and walk in relation to his  
3 reported back impairment. (*See* AR 22.) Plaintiff does not identify any error in the ALJ's  
4 acceptance of the opinion there were no associated limitations.

5 Plaintiff likewise fails to demonstrate error in the consideration of Dr. Gaffield's opinion.  
6 Dr. Gaffield did not solely consider plaintiff's ability to stand and walk in relation to low back  
7 pain. Dr. Gaffield's April 30, 2014 examination occurred some eight months after plaintiff  
8 fractured his foot and described plaintiff's report regarding that impairment as follows: "He had  
9 a recent fracture of the left metatarsal mid bone. He was supposed to wear a boot, he does not  
10 wear it all the time, just wears it when his foot hurts." (AR 376.) Dr. Gaffield's examination  
11 findings included pain on manipulation at the fracture site; plaintiff's ability to rise from chairs  
12 without effort, get on and off the examination table without difficulty, and the absence of need to  
13 hold onto the walls or furniture; a limp when bearing weight in the left lower extremity; and the  
14 inability to hop, bend or squat, walk on heels, balls of feet, or in tandem due to pain at the fracture  
15 site. (AR 378-79.) Rather than finding the fracture temporary, Dr. Gaffield assessed specific  
16 limitations, including a boot to be worn on all terrains and all occasions, and the need to avoid  
17 walking on irregular surfaces. (AR 380.)

18 Other medical evidence of record does not undermine the ALJ's conclusion. The ALJ,  
19 earlier in the decision, reasonably determined plaintiff's foot fracture was not as limiting as  
20 alleged. (AR 30.) The ALJ noted plaintiff had destroyed multiple casts, appeared in a follow-up  
21 appointment in no apparent distress and with a cast "'completely broken' in the sole", wet, and  
22 with foreign materials inside, and found this evidence consistent with the performance of greater  
23 activities than plaintiff admitted. (*Id.* (citing AR 349).) Plaintiff was "instructed to 'start taking it

1 easy and allow this foot to heal”, given a fracture boot, and admitted he had increased his  
2 marijuana consumption to deal with the pain. (*Id.*) The ALJ noted that, after his January 2014  
3 medical appointment, plaintiff continued to “wear a boot, but only when his foot hurts.” (*Id.* (citing  
4 AR 376).) He concluded: “The claimant’s ability to not wear a boot, and the medical records in  
5 which he has made only minimal follow up after being prescribed the boot, indicate that he is not  
6 as limited with his foot fracture as he alleged, compromising his credibility.” (*Id.*)

7 The ALJ found plaintiff’s ability to walk without difficulty during Dr. Pickett’s evaluation  
8 and his tendency to walk with an antalgic gait during physical examinations “consistent with his  
9 presenting as more limited than he actually is for secondary gain purposes.” (*Id.*) Dr. Pickett’s  
10 report included observations of normal gait and posture; zero restriction of movement; quick and  
11 easy movement of all extremities throughout the full range of motion without any sign of distress,  
12 pain, or difficulty; and moving at a fast pace when rising from a seated position and then  
13 immediately walking at a fast pace without any evidence of difficulty, stiffness, or imbalance. (AR  
14 385-87.) The ALJ found the fact plaintiff destroyed multiple casts consistent with a more active  
15 lifestyle than alleged. (AR 30.)

16 Finally, evidence submitted to the Appeals Council provides confirmation the fracture  
17 nonunion and ongoing pain occurred as a result of plaintiff’s failure to follow medical directives.  
18 (*See, e.g.*, AR 450 (“The patient’s likely not a good candidate for surgery given his difficulties  
19 following medical directives – exemplified when he was not able to stay off of the left foot when  
20 it was casted.”); AR 439 (“We were not successful with treating his foot and now he has a nonunion  
21 fracture because of a lack of compliance with medical recommendations.”); AR 454 (“Patient  
22 continues to smoke marijuana. He is [sic] really struggled with his addictions. Has caused  
23 significant problems for him in terms of making good decisions about his health.”)) Considering

1 this evidence, and the medical opinions and evidence described above, the Court finds no error in  
2 the ALJ's assessment of plaintiff's ability to stand and walk.

3 C. Mental Impairments

4 The ALJ concluded plaintiff had no severe mental impairment. (AR 22-25.) Plaintiff  
5 argues that, in so doing, the ALJ erred in rejecting the opinion of examining psychiatrist Dr. Jesse  
6 Markman in favor of the opinion of Dr. Pickett. This contention lacks merit.

7 In a February 2013 psychiatric evaluation, Dr. Markman diagnosed plaintiff with social  
8 anxiety disorder, attention-deficit/hyperactivity disorder (ADHD), in partial remission, alcohol  
9 abuse in full sustained remission, pain due to a general medical condition, major depressive  
10 disorder in full remission, and obsessive compulsive personality disorder. (AR 307.) Dr.  
11 Markman assigned a Global Assessment of Functioning (GAF) score of 40 (AR 308), indicating  
12 "some impairment in reality testing or communication" or "major impairment in several areas,  
13 such as work or school family relations, judgment, thinking or mood[.]" DSM-IV-TR 34 (4th ed.  
14 2000).<sup>4</sup> Dr. Markman found it difficult to "appropriately characterize" plaintiff's symptoms based  
15 on the evaluation conducted and the information available at that time. (AR 308.) He described  
16 plaintiff's symptom reporting as "quite vague", discussed inconsistencies between possible  
17 diagnoses and plaintiff's symptom reporting, and noted plaintiff was not receiving any psychiatric  
18 treatment. (*Id.*) Dr. Markman opined plaintiff could perform simple and repetitive tasks and would  
19 likely not have more difficulty completing more detailed and complex tasks, with the exception of  
20 possible difficulty with more abstract testing and concepts. (*Id.*) Plaintiff could accept instructions

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22 <sup>4</sup> The most recent version of the DSM does not include a GAF rating for assessment of mental  
23 disorders. DSM-V at 16-17 (5th ed. 2013). While the SSA continues to receive and consider GAF scores  
from "acceptable medical sources" as opinion evidence, a GAF score cannot alone be used to "raise" or  
"lower" someone's level of function, and, unless the reasons behind the rating and the applicable time  
period are clearly explained, it does not provide a reliable longitudinal picture of the claimant's mental  
functioning for a disability analysis. Administrative Message 13066 ("AM-13066").

1 from supervisors and may have more difficulty interacting with coworkers and the public due to  
2 his significant symptoms of anxiety, but could perform work activities on a consistent basis with  
3 additional supervision. Plaintiff's "only significant limitations in this regard are those caused by  
4 his physical problems and chronic pain." (*Id.*) Plaintiff "may have some difficulty maintaining  
5 regular attendance in the workplace, as frequently he won't leave his house because of his  
6 significant symptoms of anxiety[.]" and "would not be able to complete a normal workday or  
7 workweek without interruptions from his psychiatric conditions, specifically his symptoms of  
8 anxiety." (AR 308-09.) Dr. Markman anticipated plaintiff would not deal well with the usual  
9 stress encountered in a competitive work environment due to his tendency to isolate in response to  
10 stress. (AR 309.)

11       The ALJ gave Dr. Markman's opinion little weight. (AR 23.) He found it inconsistent  
12 with Dr. Markman's own observations and examination, "where the claimant was able to perform  
13 well, he was calm, and he was cooperative." (*Id.* (also describing plaintiff's performance on testing  
14 as including regular speech, logical thought process, affect congruent with content, full orientation,  
15 ability to recall 5/5 digits backward and 3/3 items after a delay, and ability to follow a three-step  
16 command and spell "world" backward).) The ALJ noted Dr. Markman's own consideration of  
17 inconsistencies and the difficulty in assessing plaintiff's situation. Further, the assessment Dr.  
18 Markman provided "was based on what was available to him, but . . . the subsequent examination  
19 by Dr. Pickett provides insight into why there were inconsistencies and difficulty assessing the  
20 situation." (*Id.*) The ALJ concluded Dr. Markman placed too much reliance on plaintiff's less  
21 than credible complaints, particularly complaints of pain and limitation. He found the opinion  
22 inconsistent with the opinion of Dr. Pickett, as well as with plaintiff's reports to medical personnel  
23 and the clinical observations of treating personnel.

1 The ALJ described Dr. Pickett's April 25, 2014 evaluation (AR 381-88) as follows:

2 The claimant reported to Dr. Pickett that it would be good for him  
3 to see someone for mental health, before his disability hearing. This  
4 is consistent with the claimant getting treatment in an attempt to  
5 demonstrate disability, but inconsistent with seeking treatment to  
6 improve his mental health. The claimant discussed plans of starting  
7 his own property maintenance business. The claimant explained  
8 that "[t]here really ain't nothing I can't do. I just don't really want  
9 to if I don't have to." Dr. Pickett observed that the claimant was  
10 outgoing, cheerful, and friendly. The claimant made good eye  
11 contact and he was attentive. . . . The claimant admitted that he is  
12 "generally a really happy kind of guy." He was able to recall 3/3  
13 items, spell "earth" backward, and repeat digits. The claimant was  
14 able to perform basic math. He followed simple and complex  
15 instructions accurately, without hesitation or difficulty. Dr. Pickett  
16 believed plaintiff's past diagnoses of mental impairments were  
17 related to his extensive drug use.

18 (AR 24 (internal citations omitted).) The ALJ's description also included Dr. Pickett's  
19 observations of plaintiff's physical capabilities, as contrasted with those of Dr. Gaffield only two  
20 weeks earlier. The ALJ found these inconsistent presentations to undermine plaintiff's credibility,  
21 and Dr. Pickett's observations, while made during a psychological evaluation, to be careful,  
22 detailed, and of value. (AR 24-25.)

23 Dr. Pickett diagnosed alcohol dependence (unknown current use status), polysubstance  
abuse versus dependence (unknown current use status), and cannabis dependence (self-reports  
current daily or near daily use). (AR 387.) As further described by the ALJ:

Dr. Pickett explained that there was a "large discrepancy between  
what [the claimant] is capable of doing versus what he is willing to  
do. His apparent lack of motivation to obtain or maintain  
employment, superimposed on what appears to be a significant  
motivation to present himself as severely impaired." Dr. Pickett  
opined that the claimant had no impairments in his ability to  
understand, recall, or follow through on instructions, regardless of  
complexity. Dr. Pickett explained that the claimant's "behavior is  
volitional and he can change his behavior to suit his goals in the  
moment."

1 (AR 24-25 (internal citations omitted).)

2 The ALJ assigned Dr. Pickett's opinion great weight. (AR 25.) He found the opinion  
3 consistent with both Dr. Pickett's and Dr. Markman's observations and testing. The ALJ also  
4 found the opinion consistent with the treatment record. The ALJ had previously described the  
5 treatment record as inconsistent with the degree of mental difficulty alleged, citing an April 2013  
6 denial of depression or anxiety, a May 2013 impression of plaintiff as "'very well' and 'happy',"  
7 and observations he was calm and cooperative during treatment. (AR 22.)

8 The ALJ also described evidence associated with plaintiff's alcohol and marijuana use. In  
9 October 2013, plaintiff denied having an alcohol problem or drinking that day, while medical  
10 personnel pointed out "he had been 'quite intoxicated' in previous visits." (AR 22 (citing AR  
11 364).) "Plaintiff attributed this to marijuana, not vodka[.]" was counseled to discontinue both  
12 marijuana and alcohol, and it was stressed that "'alcohol is a core issue [a]nd central to his health  
13 problems." (AR 22-23 (citing AR 364).) The ALJ concluded plaintiff controlled information with  
14 medical personnel, often denying alcohol use, while having a hidden flask of alcohol stuffed in his  
15 cast, and denying a history of illegal substances, but admitting its use when confronted with  
16 specific information, explaining he "'just didn't think it looked good to put that down.'" (AR 23  
17 (citing AR 384).)<sup>5</sup>

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18  
19 <sup>5</sup> In February 2013, plaintiff reported to Dr. Markman "he generally doesn't drink now but then  
20 reports he maybe had two beers at the Super Bowl[.]" and that "drinking is just very occasional for him at  
21 this point." (AR 306.) Plaintiff stated drinking "was never really a big deal for him[.]" but then described  
22 earlier DUIs, heavy drinking, and inpatient treatment. (*Id.*) Plaintiff reported he occasionally smoked  
23 marijuana, but denied any other drug use. (*Id.*) Dr. Markman assessed alcohol abuse "in full sustained  
remission." (AR 307.) In April 2014, plaintiff reported to Dr. Pickett "a lengthy history of alcoholism, but  
said he stopped drinking 'in July of last year.'" (AR 384.) "[H]e smokes marijuana currently and 'has it at  
home,' but doesn't want to 'have another bad habit.'" (*Id.*) Plaintiff at first denied any history of illicit  
drug use/dependence, but when presented with documentation from a hospital indicating "a significant and  
longstanding history of meth, cocaine, crank, and IV drug use he looked chagrined and smiled, stating,  
'Okay, okay. You got me. I just didn't think it looked good to put that down. But yeah. I have done all  
that.'" (*Id.*) Plaintiff further "acknowledged, upon detailed inquiry, that his past mental health diagnoses



1 Plaintiff states Dr. Markman was aware of his own findings on examination and asserts the  
2 ALJ improperly sought to interpret those findings on his own. Plaintiff criticizes Dr. Pickett's  
3 extensive comments on his physical functioning despite a lack of training in that area and the  
4 absence of records to review. Plaintiff states at least some of his medical providers were aware of  
5 his drug use when they made mental diagnoses rejected by Dr. Pickett, and made those diagnoses  
6 when he was in prison and lacked access to alcohol or drugs. Plaintiff identifies issues with his  
7 reporting to Dr. Pickett, stating his ADHD causes him to speak and act impulsively, noting his  
8 eighth grade education, and contending his bragging and "remarkably candid" statements did "not  
9 sound like someone who is attempting to present himself as more limited than he really is." (Dkt.  
10 16 at 9-10.) Plaintiff notes Dr. Pickett was unaware of the observations of Dr. Clerc, who had  
11 been providing treatment for some time and urged plaintiff to have a psychiatric evaluation. (*See*  
12 AR 450.) Plaintiff avers harm given that the step two finding he had no severe mental impairments  
13 implicated all subsequent steps in the sequential evaluation.

14 The Court finds no error. As stated above, an ALJ may reject a physician's opinion based  
15 on inconsistency, both internally and with other medical evidence, and based on significant  
16 reliance on a claimant's discredited self-reports. *Tommasetti*, 533 F.3d at 1041, and *Bayliss*, 427  
17 F.3d at 1216. The ALJ here reasonably considered Dr. Markman's discussion of the difficulty he  
18 encountered in rendering an assessment given plaintiff's vague reporting and inconsistencies with  
19 medical records, the insight as to that difficulty provided in Dr. Pickett's subsequent evaluation,  
20 the observations of plaintiff and plaintiff's performance on testing in both examinations, and Dr.  
21 Markman's clear reliance on plaintiff's discredited symptom reporting (*see* AR 308 (explaining

22  
23 (with the exception of childhood ADHD/ADD) occurred while he was abusing drugs and that he rarely  
informed treating providers of the extent of his drug use and addiction issues." (*Id.*) "He acknowledged  
that he 'might still dabble a bit in drug use, but 'not as much as before.'" (*Id.*)

1 the assessed limitations or possible limitations as due to “his significant symptoms of anxiety[,]”  
2 “his physical problems and chronic pain[,]” “as frequently he won’t leave his house because of his  
3 significant symptoms of anxiety, “specifically his symptoms of anxiety[,]” and “as currently stress  
4 only causes him to isolate.”))

5 Plaintiff offers an alternative interpretation of the evidence. Because the ALJ’s  
6 interpretation is at least equally rational, plaintiff’s arguments do not undermine the ALJ’s  
7 assessment of the medical opinions and evidence. The ALJ’s consideration of plaintiff’s mental  
8 impairments, the opinions of Drs. Markman and Pickett, and the medical evidence of record has  
9 the support of substantial evidence.

#### 10 Lay Testimony

11 Lay witness testimony as to a claimant’s symptoms or how an impairment affects ability  
12 to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v.*  
13 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). *But see Molina v. Astrue*, 674 F.3d 1104, 1115-22  
14 (9th Cir. 2012) (describing how the failure to address lay testimony may be harmless). The ALJ  
15 can reject the testimony of lay witnesses only upon giving germane reasons. *Smolen v. Chater*, 80  
16 F.3d 1273, 1288-89 (9th Cir. 1996).

17 The ALJ described lay witness testimony from plaintiff’s wife, Traci Comstock, provided  
18 in a February 2013 form and at hearing. (AR 32-33, 74-81, 240-47.) He gave little weight to the  
19 report and testimony upon finding inconsistency with the record as a whole. (AR 33.) The ALJ  
20 contrasted testimony of plaintiff and his wife as to the number of naps taken during a day and  
21 plaintiff’s ability to perform yard work, as well as Mrs. Comstock’s report plaintiff needed help  
22 with his hair and Dr. Pickett’s observation of plaintiff casually relaxing with his hands behind his  
23 head. The ALJ stated Mrs. Comstock “was often out of the house working and she appeared to be

1 unaware of many of the claimant's activities, such as his marijuana use." (*Id.*) The ALJ found her  
2 ability to observe plaintiff limited and her testimony to contradict plaintiff's reports. The ALJ  
3 found Mrs. Comstock's contention plaintiff could only walk 100 feet inconsistent with strength  
4 testing in the record, clinical observations, and x-ray imaging, inconsistency between her report  
5 and the opinions of all medical professionals that plaintiff had no limitation in sitting, and  
6 inconsistency with Dr. Gaffield's opinion plaintiff had no standing or walking limitations. (AR  
7 33-34.) The ALJ found Mrs. Comstock's explanation of the destroyed casts not credible, "unless  
8 the claimant was performing a greater degree of yard tasks than she admitted." (AR 34.)

9 Plaintiff disputes or minimizes inconsistencies identified by the ALJ. She states Dr.  
10 Pickett's observation of his hands behind his head did not take into account his testimony he could  
11 raise his arm, but could not use it to, for example, push down with a deodorant stick. (AR 62-64.)  
12 Plaintiff notes in his testimony he destroyed his first cast because he had run out of gas and was  
13 forced to hobble down the freeway (AR 58-59), the testimony from both plaintiff and his wife as  
14 reflecting his ultimately unsuccessful attempt to pick up construction scraps in his yard with one  
15 arm (AR 59-61, 77), his wife's explanation for his destroyed cast as owing to hidden holes in the  
16 tall, wet grass in their yard (AR 76-77), and his wife's testimony she worked from 2:15 p.m. to  
17 10:30 p.m. (AR 75).

18 Germane reasons for discounting lay testimony include inconsistency with the medical  
19 evidence, with evidence of a claimant's activities, and with a claimant's reports. *Lewis v. Apfel*,  
20 236 F.3d 503, 511-12 (9th Cir. 2001). The ALJ here reasonably assigned little weight to Mrs.  
21 Comstock's testimony for all of these reasons.

22 Plaintiff offers alternative interpretations of the testimony and evidence in relation to some  
23 of the examples provided in support of the ALJ's conclusion. Plaintiff does not, however,

1 demonstrate the ALJ's interpretation was not rational and, in some respects, fails to address the  
2 reasons and examples cited by the ALJ. Plaintiff does not, for example, address the inconsistency  
3 between Mrs. Comstock's testimony and medical opinions and the medical record. Also, and  
4 contrary to plaintiff's suggestion (*see* Dkt. 16 at 12), the ALJ did not state Mrs. Comstock was  
5 unaware of her husband's activities because she worked during the day. He noted Mrs. Comstock  
6 was "often out of the house working", and reasonably construed her testimony as showing she had  
7 limited ability to observe plaintiff and appeared unaware of many of his activities. (*See* AR 75  
8 ("Yeah, he drinks a little bit, like a little bit of beer now and then. He's not a heavy drinker. He  
9 doesn't do any of that. I guess that was in young days. We married late. . . . Maybe a little a  
10 week, not that much. . . . I haven't seen [him use marijuana.] I haven't – I don't do anything like  
11 that, so I don't know."; stating she had not "known him" to use marijuana).) The ALJ, in sum,  
12 provided multiple germane reasons for assigning little weight to the lay testimony.

13 **CONCLUSION**

14 For the reasons set forth above, this matter is AFFIRMED.

15 DATED this 6th day of October, 2017.

16 

17 Mary Alice Theiler  
18 United States Magistrate Judge  
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